

UNITED STATES' APPLICATION FOR A STAY OF CIVIL PROCEEDINGS

Comes now, the United States of America, ("United States" or "the government") by its undersigned counsel, applies for a stay of the civil proceeding against Defendant Columbia/HCA Healthcare Corporation and its predecessors, Hospital Corporation of America and HealthTrust-The Hospital Company ("Columbia/HCA") until sixty (60) days after the completion of the criminal proceedings in a related case.¹ The United States seeks a stay of the civil proceedings in this case to avoid prejudice to the ongoing national criminal cost report fraud investigation that is directly related to the allegations in the instant qui tam action. In addition, the United States seeks a stay of the civil proceedings to allow ongoing good faith settlement discussions that are currently underway between the United States and Columbia/HCA to continue unhindered without the burden of simultaneously engaging in civil discovery.

This application is consistent with the False Claims Act, which contemplates that courts may exercise their authority to grant "stays" under the provisions of 31 U.S.C. § 3730(c)(4), in deference to the pendency of related criminal matters. See S. Rep. No. 345, 99th Cong., 2d Sess. 24-25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5289-5290; Campbell v. Eastland, 307 F.2d

¹The United States does not seek a stay of civil proceedings against any other defendant. Defendants Quorum Health Group, Inc. and Quorum Health Resources, LLC ("Quorum") have filed a motion to sever this action under Rule 21 of the Federal Rules of Civil Procedure, to separate all claims against Columbia/HCA into a separate action. The United States today has filed its response to that motion to sever, which clarifies that the severance of Columbia/HCA should not include HCA Management Company. This stay also excludes HCA Management Company.

478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963). Further, granting a stay for the reasons set forth herein is correctly within the sound discretion of this Court. Petrus v. Bowen, 833 F. Supp. 581, 583 (5th Cir. 1987).

The United States proposes to advise the Court of the progress of the national criminal cost report fraud investigation and ongoing settlement discussions by means of a status report filed under seal and in camera at sixty (60) day intervals. The first such report will be provided to the Court on or before March 15, 1999.

Pursuant to Local Rule 3.01(g) of the United States District Court for the Middle District of Florida, counsel for the United States hereby certifies that they have conferred with counsel for Columbia/HCA and relator, James F. Alderson, regarding the United States' Application for Stay of the Civil Proceedings. Counsel for the relator and counsel for Columbia/HCA have advised government counsel that they do not oppose this Application.

The Court is respectfully referred to the Declaration of Assistant United States Attorney Robert T. Monk², the Declaration of Trial Attorney Vanessa I. Green attached herein, and the Memorandum of Points and Authorities filed in support of this Application.

²The Affidavit of Robert T. Monk was filed in camera and under seal with the court on January 15, 1999.

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**UNITED STATES' MEMORANDUM OF LAW IN SUPPORT
OF ITS APPLICATION FOR A STAY OF CIVIL PROCEEDINGS**

Pursuant to the decisions cited below, and consistent with 31 U.S.C. § 3730(c)(4), the United States has applied to this Court for a stay of civil proceedings against Columbia/HCA and HealthTrust-The Hospital Company (collectively "Columbia/HCA") until sixty (60) days after the completion of the related criminal proceedings. A stay of civil proceedings in this case is an appropriate exercise of the inherent authority of the Court to control the disposition of causes of action on its docket, and therefore should be entered by the Court.

I. BACKGROUND

The relator, James F. Alderson, ("relator") filed the instant qui tam action in 1993³ under the provisions of the False Claims Act, 31 U.S.C. § 3729, et seq. ("FCA") against Hospital Corporation of America ("HCA"), HealthTrust-The Hospital Co. ("HealthTrust"), and Quorum Health Group and its subsidiary Quorum Health Resources and all hospitals managed or owned since January 1, 1984 (collectively "Quorum"). Quorum and HealthTrust were formerly a part of HCA until they spun off from HCA in 1989 and 1987, respectively. Since the filing of this lawsuit in 1993, Columbia acquired two of the named defendants, HCA in 1994 and HealthTrust in 1995 and changed its name to Columbia/HCA Healthcare Corporation. The remaining named defendants in this action are Columbia/HCA and Quorum. On January 19, 1999, Quorum filed

³Relator filed this qui tam action in the United States District Court for the District of Montana. Relator moved for a change of venue to the United States District Court for the Middle District of Florida in 1997.

a Rule 21 Motion to Sever seeking to sever claims filed against Quorum into a separate action. The instant Application for a Stay of Civil Proceedings applies only to Defendant Columbia/HCA.

Relator has alleged that Columbia/HCA submitted false claims to Medicare, Medicaid and the Civilian Health and Medical Program of Uniformed Services ("CHAMPUS")⁴ since at least 1984. Specifically, relator alleges, inter alia, that all Defendants knowingly made false statements on Medicare and Medicaid cost reports regarding the following matters: 1) capital-related costs (e.g., lease payments, home office capital related costs); 2) interest expenses (e.g., bond discounts, debt cancellation costs, expenses incurred in issuing bonds, bond trustee operating fees); and 3) depreciation and non-allowable costs (e.g., personal comfort items, physician recruitment and dues, advertising and marketing expenses, property, franchise and other taxes).

In addition, relator alleges that Defendants submitted claims for reimbursement to the government knowing that they were fraudulent, and kept a set of accounting records known as "reserve" cost reports that demonstrated such knowledge. The United States intervened in this action on October 1, 1998, pursuant to 31 U.S.C § 3730 (b)(4)(A), and has taken over responsibility for litigating the case.

In September 1996, a criminal investigation of Columbia/HCA for cost report fraud was initiated by the United States Attorney's Office for the Middle District of Florida and the Federal Bureau of Investigation ("FBI") which was related in part to the allegations in this matter. See

⁴CHAMPUS provides health benefits to members of the military, military retirees, and their dependents. The program is now referred to as TRICARE.

Declaration of Assistant United States Attorney Robert T. Monk separately filed in camera and under seal.

On June 25, 1997 a federal grand jury in this district returned a five count indictment against three individuals who were former Columbia/HCA executives charging them with conspiracy to defraud the United States and making false statements to the United States. United States v. Jarrell, Case No. 97-52-Cr-FTM-24(D). The gravamen of the indictment charges, inter alia, that Jay Jarrell, Robert Whiteside, and Michael Neeb caused cost reports to be filed that improperly claimed reimbursement for certain interest expenses from Medicare and from CHAMPUS at Fawcett Memorial Hospital⁵ in Fort Myers, Florida. On July 22, 1998, the grand jury issued a superseding indictment, adding a fourth defendant, Carl Lynn Dick. United States v. Jarrell, Case No. S97-52-Cr-FTM-24(D). The case has been set for trial on May 3, 1999 by the Honorable Susan Bucklew. Although, to date, no charges have been brought against Columbia/HCA, the United States is still currently investigating a broad range of allegations involving cost report fraud by all Columbia/HCA hospitals nationwide.

In addition to the investigation that has resulted in the indictment of four former executives of Columbia/HCA, the United States Attorney's Office for the Middle District of Florida and the FBI are conducting a nationwide criminal cost report fraud investigation of Columbia/HCA that involves the very allegations raised in this case. Investigative and audit assistance is being provided by the Office of Inspector General, Department of Health and Human

⁵Fawcett Memorial Hospital is not a named defendant in the Alderson qui tam complaint.

Services ("OIG-HHS"), the Defense Criminal Investigative Services of the Department of Defense ("DCIS") and government-retained auditors.

The facts critical to both the civil action and national criminal cost report fraud investigation are closely related and in some respects may be identical; therefore there is a substantial likelihood that allowing the qui tam to proceed on the public docket could unjustly prejudice the ongoing national criminal investigation. Given this risk of prejudice to the criminal investigation, the Office of the United States Attorney for the Middle District of Florida has requested that the Civil Division seek a stay in these civil proceedings until at least sixty days after the completion of the criminal proceedings.

A stay will also encourage the parties to continue efforts towards settlement of this case. The United States is currently engaging in discussions with Columbia/HCA as to the methodology and means by which the parties can reach an agreement on the assessment of damages and ultimate settlement in this case. See Declaration of Vanessa I. Green ("Green Decl.") separately filed in camera and under seal herein, at ¶¶ 3 - 8.

II. ARGUMENT

1. This Court Has The Power to Stay The Civil Proceeding

It is well established that courts have the discretion to stay proceedings in one suit until a decision has been made in another involving the same parties. See Landis v. North American Co., 299 U.S. 248 (1936). Indeed, in Landis, the Supreme Court stated:

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its

docket with economy of time and effort for itself, for counsel, and for litigants.

Id. at 254. See CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962)(relying on Landis for authority to grant stay). Moreover, a court may stay civil proceedings "when the interests of justice seem[] to require such action." Securities and Exchange Commission v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir.)(quoting United States v. Kordel, 397 U.S. 1, 12 n. 27 (1969), cert. denied, 449 U.S. 993 (1980)); see also Kashi v. Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986). Before granting a stay, a court must consider "the competing interests which will be affected by the granting or refusal to grant a stay." CMAX, Inc., 300 F.2d at 268.

Stays of proceedings are particularly appropriate where the Government requests the stay to avoid conflict with an ongoing criminal investigation. See In re Eisenberg, 654 F.2d 1107 (5th Cir. 1981); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

Courts have long recognized the wisdom of staying civil actions or civil discovery pending the resolution of related criminal proceedings to avoid the conflict inherent in concurrent proceedings. See United States v. U. S. Currency, 626 F.2d 11, 17 (6th Cir.), cert. denied sub nom. Gregory v. United States, 449 U.S. 993 (1980); Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1089 (5th Cir. 1979), reh'g denied, 611 F.2d 1026 (5th Cir. 1980); United States v. Phillips, 580 F. Supp. 517, 518-19 (N.D. Ill. 1984).

Accordingly, the stay sought by the government is a matter which the Court may grant through the exercise of its inherent authority. Hargrove v. Henderson, No. 95-1601-CIV-T-17A,

1996 WL 467516, at *2 (M.D. Fla. Aug. 13, 1996)(court exercised its discretion and granted defendants' motion to stay discovery until the qualified immunity issue was resolved) Attachment A; Dunn v. Air Line Pilots Association, 836 F. Supp. 1574, 1584 (S.D. Fla. 1993)(stay of proceedings is generally in court's discretion); R.E.F. Golf Company v. Roberts Metals, Inc., No. 92-577-CIV-T-17A, 1992 WL 161041, at *4 (M.D. Fla. June 29, 1992)(discretion granted to the district judge concerning discovery matters has been consistently upheld, citing Petrus v. Bowen, 833 F. Supp. 581, 583 (5th Cir. 1987) and Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976)) Attachment B.

2. The United States' Ongoing National Criminal Cost Report Fraud Investigation Will Suffer Prejudice In the Event the Civil Proceedings Are Not Stayed

This court should exercise its discretion to stay the civil proceedings in this case to avoid prejudice to the ongoing criminal investigation since the investigation arises from the same allegations and some of the same parties at issue in this civil case. Without a stay civil discovery could be used prematurely to probe the government's criminal investigation, including the disclosure of the identities of witnesses, taking of witness testimony in deposition, disclosure of documents, and other evidence crucial to the ongoing criminal investigation.

Under the False Claims Act, this Court has the authority to stay a qui tam action where discovery would interfere with a criminal investigation. 31 U.S.C. § 3730(c)(4) states:

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such

discovery for a period of not more than 60 days . . . The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

See also, U.S. ex rel. Burr v. Blue Cross and Blue Shield of Florida, Inc., 153 F.R.D. 172, 173 (M.D. Fla. 1994)(qui tam action where case background stated that the court granted the United States motion to stay, after the United States had intervened, and directed the United States to file a status report every sixty days, in camera, detailing the progress of parallel criminal proceedings); U.S. ex rel. McCoy v. California Medical Review, Inc., 715 F. Supp. 967, 969 (N.D. Cal. 1989)(court is allowed to control discovery in the civil case when the Government makes a showing that such discovery would interfere with the Government's investigation or prosecution of other matters arising out of the same facts).

Moreover, the Fifth Circuit, aware of the distinctions between civil and criminal discovery, has consistently upheld motions to stay civil cases in order to prevent defendants in criminal cases from using civil discovery to obtain information that would not be available to them in the criminal case. See Campbell v. Eastland, 30 F.2d at 487; In re Eisenberg, 654 F.2d at 1113. Indeed, in Campbell, the Fifth Circuit stated:

In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters, and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Id. at 487.

The Court went on to say that:

A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. Id.

Finally, the Court in Campbell recognized that criminal prosecutions take priority over the rights of the litigants in civil cases:

The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities. Id.⁶

This circuit has followed the precedents of the Fifth Circuit. See United States v. Tison, 780 F.2d 1573 (11th Cir. 1986).

As noted by the criminal prosecutor in this case, some of the issues alleged in this qui tam are the same issues that are currently subject to an ongoing criminal investigation of Columbia/HCA involving Medicare cost report fraud and Columbia/HCA's use of "reserve" cost reports to conceal the nature of the false claims submitted to the government. Thus, it is clear that

⁶ The precedence of criminal actions over civil cases was reaffirmed by the Fifth Circuit In re Eisenberg, 654 F.2d at 1113, where the Court noted that the district court "properly considered Campbell v. Eastland's statement of this circuit's policy that criminal prosecutions take priority over civil actions". The Court in Eisenberg also upheld the district court's order denying discovery, noting that:

[a]s a concomitant of its conclusion that criminal cases should advance before parallel civil actions, Campbell held that liberal civil discovery procedures were not a "back door" to information otherwise beyond reach under the criminal discovery rules.

Id.

a stay is warranted in this case, where there is an active, on-going criminal investigation of at least one defendant — Columbia/HCA.

Moreover, the ability of the government to gather facts and to interview witnesses in the criminal proceeding might be impaired, and the conduct of potential witnesses might be altered, if Columbia/HCA is able to gather information about the specifics of the criminal investigation through civil discovery. Finally, the integrity of the criminal proceeding could well be compromised if the information gained in the criminal investigation is released through civil discovery. For these reasons, the United States requests that the Court allow, at least, a stay until sixty days after the completion of the criminal proceedings.

3. Ongoing Settlement Discussions Between the Parties May be Jeopardized if a Stay is Not Granted

This court has discretion to stay the civil proceedings to allow the parties an opportunity to engage in further settlement negotiations. Petrus v. Bowen, 833 F. Supp. 581, 583 (5th Cir. 1987) (court has broad discretion to stay discovery until preliminary questions that may dispose of the case are determined); Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976)(the broad discretion granted to the district judge concerning discovery matters has been consistently upheld); Florsheim Shoe Company v. United States, 744 F.2d 787 (Fed. Cir. 1984)(questions of the scope and conduct of discovery are committed to the discretion of the trial court).

Earnest efforts towards resolution of the issues presented in this qui tam suit have been undertaken by Columbia/HCA and the government. See Green Decl. at ¶¶ 3 - 8. Therefore, a stay of the civil proceedings for purposes of settlement negotiations would promote judicial

economy and likewise conserve the parties' resources, assist in narrowing and defining the issues and increasing the possibilities of settlement.

4. There Will Be No Prejudice to Any Party By the Granting of a Stay

A stay in these proceedings would not unduly prejudice Columbia/HCA in this case. In fact, Columbia/HCA and the relator have agreed to a stay of the civil proceedings to allow settlement discussions among the parties to continue. Further, a stay would conserve the time and resources of the court as well as the parties to this action.

Attention should be given to the cautionary note in the Supreme Court's Landis opinion regarding opposing claims that a stay, if granted, "will work damage [] to a litigant in one cause [who will] be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." Landis, 299 U.S. at 255.

Judicial economy will be served by the potential resolution of some of the disputed issues in this qui tam action. It is well-established that a prior criminal conviction will operate as an estoppel in a subsequent civil proceeding as to those issues that were determined in the criminal matter. See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-69 (1951). Thus, should the criminal investigation result in a conviction for any violations of the criminal false statements, these dispositions may facilitate the resolution of this civil proceeding thereby conserving spare judicial resources and reducing litigation time and expense.

Even if the criminal investigation does not lead to a criminal conviction, the proceedings may well provide the parties with evidence and information on the issues of liability and damages, thereby reducing the amount of discovery required in this civil action. This principle has been

codified in the False Claims Act. See 31 U.S.C. § 3731(d). Accordingly, it will promote judicial economy and reduce litigative time and expense to stay the civil case pending the conclusion of the criminal proceedings and settlement negotiations that the parties are currently engaging in.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that its Application for a Stay of Civil Proceedings until sixty (60) days after the completion of the criminal proceedings in a related case be granted.

Respectfully submitted,

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ORDER

The court having considered the application by the United States for a stay of the civil proceedings until sixty (60) days after the completion of related criminal proceedings and good cause having been shown,

It is hereby

ORDERED the civil proceedings be stayed until sixty (60) days after the completion of the criminal proceedings in a related case.

IT IS FURTHER ORDERED that the United States shall submit a status report under seal and in camera at sixty (60) day intervals, advising the Court of the status of the criminal proceedings and ongoing settlement discussions. The first such report to be provided to the Court on or before March 15, 1999.

IT IS SO ORDERED,

This _____ day of February, 1999, in Chambers at Tampa, Florida.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record